IN THE

Supreme Court of the United States

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF PETITIONERS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 90

COLUMBIA BROADCASTING SYSTEM, INC., THE AMERICAN TOBACCO COMPANY, and JACK BENNY,

Petitioners,

vs.

LOEW'S, INC., and PATRICK HAMILTON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF PETITIONERS.

I.

The Ruling Below Will Stifle the Creation of Parody and Burlesque.

Respondents' opening contention—the claim that burlesque and parody do not need to use substantial copyrighted material (Br. 9-15)—focuses a vital issue in the case. The courts below have held that parody and burlesque are to be treated no differently from any other appropriation, with the result that infringement would exist if the taking were substantial [R. 252, 284]. The "substantiality" of a taking in the ordinary plagiarism case is measured by rigorous standards. As we have pointed out, the use of a single scene, sequence or incident may constitute infringement under that test (Opening Br. 32-34). The thrust of respondents' argument is

that this restrictive test would not handicap the creation of parodies and burlesque.

Respondents' argument in this regard overlooks the nature of the art of parody and burlesque and the way it is created. In a successful parody or burlesque, it is absolutely essential for the writer to call up in the minds of his audience the "original" toward which he is directing his burlesque. To do this he must use enough of the "original" to remind his audience of the plot, the setting, the characters, the sequence of incidents, the ideas, or the treatment of the original—or of some or all of these aspects of the original depending upon his focal point. These constitute the platform from which he takes off.

The author then creates a contrasting image. The effectiveness of his parody or burlesque will depend on the audience's perception of the contrast and the interplay between the new image and the original. Only to the extent there has been firmly fixed in the audience's mind a clear recollection of those details of the original from which the desired mental contrast is intended to arise can the parodist produce the peculiar effect which distinguishes parody and burlesque from other art forms.

To determine the legality of the author's use of copyrighted material to remind his audience of the "original," the courts below would apply only the "substantiality" test which is applicable to ordinary plagiarism and which measures infringement solely by the *amount* of the copyrighted material used by the author of the defending work. Under that test, authors, publishers, and producers would all face the paradox that only an unsuccessful parody or burlesque, one which fails effectively to remind its audience of the "original," would be

sure to escape a charge of infringement. Only such a parody or burlesque would not be "recognizable by an ordinary observer as having been taken from the copyrighted source." *Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc.*, 73 F. 2d 276, 278 (2d Cir., 1934), *cert. den.* 294 U. S. 717; *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F. 2d 354, 361 (9th Cir., 1947); *Kustoff v. Chaplin*, 120 F. 2d 551, 560 (9th Cir., 1941).

The famous parodies and burlesque of literary history provide trustworthy evidence that the use of copyrighted material is necessary for the health and vigor of the art. Many of them—in fact, all that focus upon the "story line" of the original—would fail the rigorous test of "substantiality" and thus be found to infringe. By way of illustration, we believe that each of the parodies set forth in the Appendix to our opening brief* would be

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*The parodies contained in that Appendix are only examples and the list could, of course, be multiplied. Thus, Thackeray's "Legend of the Rhine" in "Novels by Eminent Hands" (1845) is a story-line parody of Dumas' "Otto the Archer" (1840). Thackeray also parodies Disraeli's "Coningsby" (1844) in "Codlingsby" (1845), and Disraeli's novel "Lothair" (1870) was also parodied as to its story by Bret Harte in "Lothaw" (1871). Jane Austen in portions of "Northanger Abbey" (1797) burlesqued the mood, part of the story line, and the important incidents in Mrs. Radcliff's "Romance of the Forest" (1791) and "Mysteries of Udolpho" (1794). The plot of M. G. ("Monk") Lewis' famous Gothic romance "The Monk" (1791) was ridiculed in a burlesque entitled "The New Monk" by "R.S. Esq." in 1798. Dumas (*fils*) "Camille" (1852) and DuMaurier's "Trilby" (1894) have each been parodied as to story a number of times.

Francis Burnand, famous editor of Punch, wrote perhaps a hundred dramatic and literary burlesques and parodies, a good example of which is his burlesque, "The Latest Edition", (1866) of Douglas Jerrold's "Black-eyed Susan" (1829). Henry J. Byron was another prolific English dramatic parodist. Typical are his "Miss Eily O'Connor" (1861), taking off Dion Boucicault's "Colleen Bawn" (1860) and "La! Somnambula" (1865), satirizing the plot of Bellini's opera "The Sleepwalker," (1831).

The New York Public Library drama section contains a number of typescripts of various turn-of-the-century Weber and Fields bur-

held to constitute an infringement under the "substantiality" test applicable to ordinary plagiarism.* At the same time, all of these parodies almost certainly would be held permissible under the "fair use" test which we urge should be applied.

The testimony of Dr. Frank Baxter, the only witness at the trial, certainly presents no support for respondents' claim (Br. 10-14) that parody and burlseque do not need to use substantial copyrighted material. Dr. Baxter's

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lesques, exemplified by "Arizona" (1900) [Exs. 16, 17]. Barry Pain attacked Michael Arlen's "Green Hat" (1925) in "This Charming Green Hat Fair" (1926). Robert Benchley's collected works contain parodies of Thomas Beer's "Mauve Decade" and Galsworthy's "Forsyte Saga". Christopher Ward, in three little books, "Triumph of the Nut" (1923), "Twisted Tales" (1924), and "Foolish Fiction" (1925) parodied the works of many authors. His parody titles, such as "Blacker Oxen", "Captain Bloodless" and "The Blunderer of the Wasteland" identify his targets. E. B. White's "Across the Street and Into the Grill" uses the plot line and style from Hemingway's "Across the River and Under the Trees".

The French have been particularly adept at this art. Voltaire's "Oedipe" (1718) was travestied by Biancolelli in "Oedepi Travesti" (1719) to the great French philospher's chagrin. Biancolelli also parodied Houdar de La Motte's "Inez de Castro" in 1723, and from them on French dramatic parodies have been numerous. See Yankwich, "Parody and Burlesque in the Law of Copyright," 33 Can. Bar Rev. 1130, 1134; Grannis "Dramatic Parody in 18th Century France" (N.Y. 1931); Travers, "Catalogue of the 19th Century French Theatrical Parodies" (N. Y. 1946).

*The extent of the use of the "original" in "Shamela" is indicated by the following comments: (i) "Its [Shamela's] cruel cunning lies in the way the author, who perfectly realizes the vulgarity of Richardson's creation, has dogged the footsteps of his victim, using time and again the very language of the original and gently tilting every equivocal situation or speech into downright vice or depravity." Kitchin, "Survey of Burlesque and Parody in English" 169 (Oliver and Boyd Ed. 1931); (ii) "Fielding reduces Richardson's two volumes to half a hundred pages, pinning scenes together with details from here and there (examine Shamela's relationship with Mrs. Jewkes), and yet following Richardson's contours exactly." Preface to "An Apology for the Life of Mrs. Shamela Andrews," p. xxxi (Baker Ed. 1953).

testimony that a burlesque does not precisely parallel the original (which respondents emphasize) is, of course, true. If it did, it could not be a burlesque. A burlesque is created by the deviations from the original; the art form therefore requires for its existence *both* the original *and* the deviations.

However, if respondents purport to infer from that testimony that a true burlesque never follows the broad "story line" of the original or never uses substantial sequential copyrighted material, they ignore not only the whole intendment of the witness's statements, but the entire history of the art.* To the contrary, considered in the light of the rigorous standards of substantiality, the testimony clearly indicates that parody and burlesque do need and do use copyrightable material to an extent which would not be permitted by such standards.** Referring to "Shamela," Dr. Baxter said:

> "While it is shorter than the original, the key incidents are used. . . . And of course it is a

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*"It follows that a rigid formula which would apply to parody and burlesque the sole test of substantiality of copying to be determined by similarity of sequence or 'order of events' in story development, and which would disregard all others, finds no support in the literary history of the English-speaking world. More, the use of such a formula would destroy the comic art, so important and rare, of which parody and burlesque are a part." Yankwich, "Parody and Burlesque in the Law of Copyright", 33 Can. Bar Rev. 1130, 1154 (1955).

**In referring to the need of parody and burlesque for copyrighted material, the word "need" is used in the sense of Webster's definition: "The lack of anything requisite, desired or useful; as, he felt the need of a better education". Webster's New International Dictionary, 2d Ed., Unabridged. Some parody and burlesque might survive under the tests laid down below, just as man might survive uneducated. But it is our position that the use of copyrighted material is useful and desirable for the health and vigor of the arts of parody and burlesque.

> magnificent burlesque, and you follow point by point the events, the significant events of Pamela, in this 'Shamela.'" [R. 123.]

Similarly, with respect to Corey Ford's "Salt Water Taffy," Dr. Baxter observed:

> "Chapter by chapter, book No. 1, the original, is followed in this mocking burlesque." [R. 130.]

Thus, while a parody or burlesque is usually much shorter than the original, and may not precisely parallel it, Dr. Baxter's testimony leaves little doubt but that the material it does use will very often rise to the level of "substantiality" as laid down in the cases.

Nor is there any help for respondents in Dr. Baxter's testimony that a burlesque "takes off into the blue." As Dr. Baxter makes clear [R. 149, 156], the platform for the take-off (and to which the writer must "constantly come back") is, in most instances, composed of copyrightable material which is cumulatively substantial. Thus, to apply the test of "substantiality" to burlesque would handcuff the author in the construction of that essential platform.*

Contrary to respondents' suggestion (Br. 12-13), it is also clear that *Columbia Pictures Corp. v. National Broadcasting Co., Inc.*, 137 F. Supp. 348 (S. D. Cal., 1955), upholding a burlesque of the motion picture "From Here to Eternity," does not show that parody and burlesque

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*Respondents do not advance their argument by announcing (Resp. Br. 14) that there may be parodies of philosophies or social and political attitudes which do not present any copyright problem. The question presented here concerns parodies and burlesques of specific, copyrighted literary and dramatic works, which constitute perhaps the most important part of the *genre*.

can prosper under the holding of the court below. Although that case was tried within a year after this case, the period of reflection between the cases apparently caused Judge Carter to alter his view that parody and burlesque are to be treated as any other use of literary property. The conclusions of law in the "Eternity" case state that "The law permits more extensive use of the protectible portion of a copyrighted work in the creation of a burlesque of that work than in the creation of other fictional or dramatic works not intended as a burlesque of the original." 137 F. Supp. at 354. Thus, the burlesque of "From Here to Eternity" was held not to infringe on the basis of a special rule applicable to burlesque and parody rather than under the standard applicable to ordinary plagiarism.

Although Judge Carter was more hospitable to burlesque in "Eternity" than in this case, he did not accept the principles of fair use as we view them (Opening Br. 46-49). He there based his decision, as respondents correctly state, on a finding that there was not a substantial taking of copyrighted material and, while his opinion is not entirely clear, he appears to invoke a concept of "fair use" which is controlled by some measurement of the "substantiality" of the taking.[6]

What is important here, however, is that in "Eternity" Judge Carter recognized that the nature of parody and burlesque requires that the author of such a work be permitted to use more copyrighted material than would be permissible where the alleged infringing work is of the same character as the copyrighted work. The court below in the case at bar, which is the law of the Ninth Circuit, not only failed to apply the principles of fair use as we view them, but it even declined to acknowledge

that the test to be applied to parody and burlesque is in any way different from that applicable where the alleged infringing work is of the same character as the copyrighted work.

II.

The Doctrine of Fair Use Is Not Limited to Insubstantial Uses. It Permits Uses Which Would Otherwise Constitute Infringement of Copyright.

Respondents' brief in this court represents a significant change of position on a vital point. In the courts below respondents recognized that the function of the doctrine of fair use is to permit a use of copyrighted material which would have constituted infringement but for the application of the doctrine. They recognized that the doctrine was not formulated to justify non-infringing uses, such as uses of ideas and themes which cannot be copyrighted and which everyone is free to use in any event, and such as insubstantial uses of copyrighted material which everyone is likewise free to make without regard to the doctrine of fair use. Respondents thus heretofore recognized that the doctrine of fair use was not synonymous with non-infringing use. They vigorously contended, however, that the doctrine was not applicable to parody and burlesque (see Resp. Br. 31, n. 25).

The courts below accepted both aspects of this argument: They acknowledged the existence of the doctrine of fair use as being applicable to uses which would otherwise be infringing, but they held that the doctrine was generally limited to "compilations, listings, digests, and the like" and that it did not extend to parody and burlesque [R. 282-283].

Respondents, however, now assert that fair use is simply another name for non-infringing use and that it never permits the use of substantial copyrighted material. This attempt to make "fair use" synonymous with "non-infringing use" and thus to read the doctrine of fair use out of the copyright law, should be rejected. Our opening brief (pp. 22-27) sets forth a sampling of the cases that apply the principle of fair use as an independent doctrine permitting uses which would otherwise infringe. Other decisions are referred to in such articles on the subject as Yankwich, "What Is Fair Use?" 22 U. of Chi. L. Rev. 203 (1954); Cohen, "Fair Use in the Law of Copyright," 6 ASCAP Copyright Law Symposium 43 (1955); and Note, 56 Col. L. Rev. 585, 593-597. These decisions and authorities demonstrate that it is too late to sweep aside a principle which courts of the United States have applied for more than a century and which so significantly reflects the constitutional purpose of copyright.

Contrary to respondents' claim, the test to be applied under the principle of "fair use" is not the same as the test of "substantial taking." The "substantial taking" test determines infringement solely by a measurement of the *amount*, quantity-wise, or quality-wise, of the author's work taken by an alleged plagiarist. As put by both lower courts, "the issue* becomes . . . what was taken, and how substantial was the taking; and if it is determined that there was a substantial taking, infringement exists" [Rep. 284, 252, 230-231]. But while such a test is appropriate in the case of the ordinary literary plagiarism, where

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* And, according to both courts, the *sole* issue, in the case of a parody or burlesque, where access to and use of the original are not only admitted, but asserted by the parodist.

anything more than a *de minimis* taking of that which is protected by copyright is and ought to be actionable, its application to every use of a copyrighted work, regardless of its purpose or nature, would violate the Constitutional mandate "to promote the Progress of Science and Useful Arts." Thus, in those cases other than plain piracy, the courts under their well established "fair use" principles look not alone to the *amount* used, but also to *why* it is used and *how* it is used, and above all, whether the use is needful to promote the public interest without at the same time unduly affecting the economic interest of the copyright owner to a point which defeats the Constitutional purpose. "Fair use" is the judicial appraisal of the sum total of all these factors, made in the light of the Constitutional purposes.

The right of a critic or reviewer to use copyrighted material under the principles of fair use, which respondents recognize (Br. 38), makes clear the striking difference between the "fair use" standard and the test of a "substantial taking." An extensive review or criticism of a play, a book, or a movie frequently contains very much more of the copyrighted material than would be proper if the purpose were not to review or criticize. "Lengthy extracts" from the subject work are permissible. *Hanfstaengl v. Empire Palace*, 3 Ch. 109, 128, 70 L. T. Rep. (N. S.) 854, 860 (1894), per Lindley, J.; *Bell v. Whitehead*, 8 L. J. 141, 142 (1839). Because the extracts are for the purpose of review or criticism, however, the test of infringement is not whether there has been a "substantial" taking but whether the criticism supersedes the original work or becomes a substitute for it. See *Lawrence v. Dana*, 15 Fed. Cas. No. 8136, at 61 (C. C. D. Mass., 1869); *Folsom*

v. Marsh, 9 Fed. Cas. No. 4901, at 344 and 345 (C. C. D. Mass., 1841); *Farmer v. Elstner*, 33 Fed. 494, 496 (C. C. E. D. Mich., 1888). Thus, where the principle of fair use is applicable, the standards are properly more liberal than the test of "substantiality" to be applied in a case of ordinary plagiarism.

The "illustration" cases provide other examples of circumstances in which a substantial taking is justified by the doctrine of fair use. It would be difficult to argue that the verbatim quotation of 13 lines of a popular song was an "insubstantial" use. A use of this amount by another writer of songs of a similar type would undoubtedly be actionable. *Cf. Robbins Music Corp. v. Weinstock*, 107 F. Supp. 102 (S. D. N. Y., 1952). Its use by the "New Yorker" magazine, however was held to be a "fair use" because of the purpose and manner in which it was used. *Broadway Music Corp. v. F-R Pub. Corp.*, 31 F. Supp. 817 (S. D. N. Y., 1940). The same is true of the quotation in "The Saturday Evening Post" of the lyrics of a song written for the Green Bay Packers football team. *Karll v. Curtis Pub. Co.*, 39 F. Supp. 836 (E. D. Wis., 1941).

Respondents' attempt to confine the doctrine of "fair use" to "insubstantial use" of copyright material runs counter to the views of commentators who have reviewed the cases in this field. One commentator points out that "Even if substantial appropriation is found, a cause of action for infringement is defeated if the borrowing comes within the doctrine of 'fair use.'" Note, 56 Col. L. Rev. 585 (1956). Another characterizes a view of the principle of "fair use" similar to that urged by respondents as "not in accord with that given to the term

in the great majority of cases." Cohen, "Fair Use in the Law of Copyright," 6 ASCAP Copyright Law Symposium 43, 46 (1955).

The position to which the author of a parody or burlesque is entitled is no more a preferred position than that enjoyed by a critic, a reviewer, a compiler, or a treatise writer (*Cf.* Resp. Br. 15-17). Wherever the doctrine of fair use may properly be invoked, the principles to be applied to govern the extent of its application are the same; it is only the weight given to each factor which necessarily varies with the facts.* Moreover, it is particularly appropriate that the principles underlying the doctrine of "fair use" should be applicable to parody and burlesque for the reason that they constitute new and independent creative works. In this latter sense they are sharply distinguishable from the abridgements, condensations, translations, dramatizations, and novelizations referred to by respondents (Br. 16).

Respondents state that they altered their position on "fair use" in part because of the difficulty of framing a generalization that would fit all of the cases. We have ourselves noted the difficulty of an all-inclusive definition (Opening Br. 27), but this is not an adequate reason for abandoning the concept of fair use. The Constitution requires that the copyright monopoly leave room for the dissemination of knowledge and the promotion of the

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*In that connection it must be remembered that the parodist or burlesquer alone among the practitioners of independent literary forms (save for the critic and reviewer) must use an "original" to some extent; he has no other alternative. Where some use is dictated by necessity, less weight ought to be given to the factor of the amount used than in cases where the author may produce substantially the same result without any use whatsoever of another's work.

useful arts. The unifying element in the cases applying the doctrine of fair use is the Constitutional mandate. See Yankwich, "What is Fair Use," 22 Univ. of Chi. L. Rev. 203, 213-214; Note, 56 Col. L. Rev. 585, 595. This Court should interpret the doctrine in accordance with the Constitutional objectives and decline to accept the debilitating construction now proposed by respondents.

Application of the principles of fair use relied upon by petitioners would not require a court to uphold every parody or burlesque that might be written, as respondents have suggested (Br. 45). Rather the test to be applied would result in the approval of only those bona fide parodies and burlesques which do not supersede or become a substitute for the original, as we have indicated in our opening brief, 46-49. Neither of the courts below determined whether the burlesque "Autolight" is a fair use under these principles. That issue should be decided by this Court or by the trial court upon remand.

III.

The Nature and Effect of the Use Here Made Does Not Make It "Unfair."

Respondents' contention that the nature of the use made here is "commercial" and hence should defeat any claims under the principles of fair use (Br. 35-40) is not well taken. It is true that television and radio productions are financed by means of sponsorship of commercial advertisers while publishers of books or producers of plays generally vend their wares directly to the public. However, the different economy of radio and television presents no reason for according different treatment to literary works presented over these media. Such works are not themselves advertisements; they represent

no less intellectual integrity than do the motion pictures of respondent Loew's. After all, few national magazines could exist without subsidization by advertisers who believe their literary content will attract readers who will thus be exposed to the advertisements.

The media of radio and television are entitled to the same respect and freedom as the media of books, magazines, stage or screen. They provide at least as great an impetus to creation and as great a market for the artist's work as do those other media. While the merits of individual programs on radio or television may be subject to debate, the fact is that many fine, perhaps great, literary accomplishments would never have reached the public were it not for the sponsorship of American commercial and industrial enterprises.* The nature of the economic support given to those works in no way changes their character or makes them products of a solely commercial or utilitarian nature.

The claim of respondents (Br. 42) that this particular parody must be an "unfair use" because it was presented over the generally competing medium of television is likewise without merit. All parodies must necessarily be aimed at the same general audience as their originals—those who can read and see and hear. Certainly "Salt Water Taffy" competed in the book trade with all other books in general, including "Cradle of the Deep" itself. So to some extent at least would a book

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*Respondents' repeated gibes at the fact that the parody in the instant case was sponsored by a national manufacturer of cigarettes (Br. 1, 2, 3, 8, 37, 39, 52) do not enforce their argument, especially in the light of the fact that Loew's pictures, including "Gaslight", may be regularly and repeatedly seen over television on programs sponsored by advertisers of various products, including soap, detergents and toothpaste.

criticizing an original. The fact that television may be a particularly effective competitor of the theatres should not require a special discrimination against it. If the parodist or burlesquer has created an original literary work, and not merely a subterfuge or substitute, he should be as entitled to exploit it on television as in the field of books or magazines, and as any other author. Furthermore, in this particular case, the competition was no more than general; "Gaslight" had been out of release for several years.

Respondents' claim (Br. 41.) of injury through preemption of the copyright owner's market for a burlesque of his own works (disregarding the inherent unlikelihood that any such burlesque can or will be successfully attempted by the author of the original) is necessarily based upon the proposition that he and he alone should determine whether, when and how his work should be the subject of pointed laughter. The claim may equally as well be made that an author shall exclusively determine whether, when and how his work shall be criticized. Such a claim only points up our contention that the copyright law should not be construed to stifle either parody or criticism.

Finally, respondents argue (Br. 42) that the parody was injurious in that it cast aspersions on the picture. There is no factual basis for any such claim, the District Court did not find that "Autolight" would inflict any pecuniary injury upon respondents; in fact, it specifically declared that no such injury was necessary to recovery [R. 253-256]. Actually, the inference is at least equally strong that the parody would help the picture by keeping the memory of this out-of-release production green and flourishing, thus inducing desire to see it again. In any

event, if in fact a parody or burlesque does have the effect of pointing up the weakness of the original, that does not make its use of such an original an unfair use. That is one of the legitimate functions of a parody or burlesque, whether primary or merely incidental, just as it is of direct criticism.

> "A criticism of the original work, which lessened its money value by showing that it was not worth seeing or hearing, could not give any right of action for infringement of copyright." (*Hill v. Whalen & Martell, Inc.*, 220 Fed. 359, 360 (S. D. N. Y., 1914.)

Often the most effective weapon in criticism is to use the author's own words, development or treatment against himself. The same is true in parody and burlesque. The result is *damnum absque injuria*—the price the author pays and ought to pay if intellectual competition is to be free.

Parody and burlesque are art forms of real public value, and as such entitled to be fostered and encouraged in accordance with the Constitutional mandate. For such encouragement they need the broad application of the principles of fair use. In these circumstances, we submit that only an "injury" which had the effect of substantially discouraging the creation of other equally important literary types would be worthy of consideration in determining whether or not such principles of fair use shall be applied to parody and burlesque. No such injury has here been shown, nor do we think it could be. Parody and burlesque have existed and flourished for some thousands of years, and we do not believe a single author or publisher has ever been deterred in presenting a literary production to the world by the realization

(which up to now has been universal) that somebody else might use it for parody purposes. We venture the assertion that no person, including Loew's, would ever pay one penny less for a literary work if the lower courts' decision here were overturned, as we contend it should be. If that be so, there is no "injury" to the copyright owner—certainly none which can begin to compensate for the injury to the public arising from the stifling of this delightful and valuable art.

Conclusion.

It is respectfully submitted that the judgment below should be reversed.

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